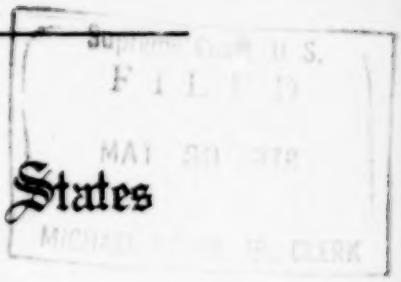
In The

Supreme Court of the United States



October Term, 1977

No. 77-1816

FRANK DI GILIO and EUGENE SANGILLO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINIONS BELOW

The petitioners, Frank DiGilio and Eugene Sangillo were found guilty on July 20, 1976 of the first, second and third counts of the indictment (Appendix, *infra* at 1a). There were no opinions in the District Court with respect to any of the motions that were made therein. There was no opinion of the United States Court of Appeals for the Third Circuit. But rather the appeals of the petitioners were denied by the United States Court of Appeals for the Third Circuit on April 25, 1978 which was the same date that they were argued.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 25, 1978. A petition was filed for a stay of the issuance of the mandate on May 3, 1978. This petition is being filed within 30 days of the request for the stay of the issuance of the mandate. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."

QUESTIONS PRESENTED

1. Whether petitioners were deprived of their Sixth Amendment right to a speedy trial.

2. Whether the conviction herein violated Petitioner Frank DiGilio's rights pursuant to the Fifth Amendment of the United States Constitution barring double jeopardy.

STATEMENT

In and about July 1973, the petitioners were indicted and charged with four (4) separate counts alleging violations of 18 U.S.C. §2, 18 U.S.C. §371, 18 U.S.C. §495, and 18 U.S.C. §2314. The indictment charged a conspiracy to falsely make and forge and cause to be forged certain United States Savings Bonds; forging United States Savings Bonds; uttering forged United States Savings Bonds; and the transportation of forged United States Savings Bonds. The petitioners pleaded not guilty to the indictment. Thereafter, and during the trial of these petitioners in July 1976, the indictment was redacted so as to exclude the charges relative to 18 U.S.C. §2314. The events complained of in both the original and the redacted indictment allegedly occurred in September and October 1968.

On April 5, 1974 the trial court set forth that the cause would be tried in September 1974. On or about May 9, 1974, Petitioner DiGilio moved for a severance of his trial based upon his assertion that vital witnesses for his defense were co-defendants, and could not be expected to take the stand and to testify while they themselves were in jeopardy. The motion for a severance was contested by the Government and it was denied by the court, and after its denial, the trial court set forth that the trial would commence July 8, 1974.

It must be taken into consideration by the Court that the Government had to be ready to try the case against DiGilio in September of 1974, when the matter was called for trial. It was after the Government participated in the selection of the jury that it first asserted that its needs could only be satisfied by a severance of Petitioner DiGilio for the trial. The Government failed to explain why it participated in the selection of a jury with the participation of Petitioner DiGilio when it was not prepared to conduct its trial against all of the co-defendants, including Petitioner DiGilio. There is no question that the application for a severance was made prior to the swearing of

the jury, but it is set forth herein that Petitioner DiGilio's constitutional rights were violated despite the fact that his case was severed prior to the swearing in of the impaneled jury. Petitioner DiGilio was deprived of going to trial and having a final determination made by the first jury which was impaneled with respect to the charges against him. The Government proceeded to the selection of the jury without setting forth either that Mr. Wankmuller was unavailable, or by setting forth that Mr. Wankmuller was missing because of a threat. It was not until September 20, 1974 that the Government sets forth that it discovered that it was unable to contact its witness. In an affidavit of Assistant U.S. Attorney Joseph Cranwell, Mr. Cranwell set forth that he discovered on September 18, 1974, that he discovered from Gerald Festa that Nicholas Valvano told Festa that John DiGilio told Valvano to make sure that a Government witness be taken care of. This conversation between John DiGilio and Valvano was alleged to have taken place in August 1973 (7B). Nothing further was set forth before the trial court to in any way show that the statement contained in Cranwell's affidavit which reflects triple hearsay had any validity or was accurate. Instead, the United States Government made a statement to the court in an affirmative manner that they had gathered evidence that one of the defendants had taken steps to guarantee that an important Government witness would not appear to testify. That statement made to the court was totally inaccurate when considered in light of the content of the affidavit of Cranwell sworn to on September 20, 1974. The Government asked that the record be sealed, which request was granted by the court so that defense counsel were not advised of the balance of the statement made by the Government to the court. At the time that the Government made the aforesaid statement, the Government did not ask for a severance of the trial against Petitioner DiGilio, but rather asked for sufficient time so that they could produce the witness, Wankmuller. The court was fully cognizant of the problems of double jeopardy, and expressed itself in that manner at that time. The court further realizing the gravity of the situation created by the

request for an adjournment after the impaneling of the jury, set forth that at no point would it grant an adjournment beyond the following Monday. At that point, the attorneys for the defendant were excused, and Cranwell remained with the trial court. Cranwell then set forth a statement with respect to a statement alleged to have been made in August of 1973 by Valvano to Festa, and continues to basically repeat that which is contained in Cranwell's affidavit, except for one vital omission. At no point during the conversation between the trial court and Cranwell, outside of the presence of the attorneys for the defendants does Cranwell ever mention that either Mr. Wankmuller was in physical danger or that anyone had ever threatened to take care of him. On the following Monday, a hearing commenced before the trial court, at which point, the United States Government made an application to Petitioner DiGilio from the case. There were no basis set forth at that time that would in any way support the application for such a severance. The attorney for Petitioner DiGilio opposed such a severance, and set forth Petitioner DiGilio was absolutely ready to try the matter; that he had participated in the proceeding for the selection of the jury; and that no reasons had been set forth so that counsel could determine whether or not he was in a position to oppose the application for a severance. Counsel set forth that he was willing to listen to such reasons, if there be any, even *in camera*. Counsel set forth that if the court granted the motion for a severance, that counsel was requesting a firm trial date. Mr. Cranwell responded by setting forth that his application was based upon the same reasons that were put on the record before the court the prior week *in camera*. It is respectfully submitted that the only reason that was submitted to the court *in camera* was that one of the Government's witnesses was missing. Nothing was set forth in that *in camera* proceeding relative to any threats. Mr. Cranwell went further and set forth that he would be happy if the trial court set a fixed trial date sometime perhaps two or three weeks from now. This evidences the fact that the only problem that the Government had was in locating its witness and its certainty that the locating of the

witness was no problem at all. On nothing additional to set forth any manifest necessity, the trial court proceeded to grant the motion for a severance. In essence, the trial court denied Petitioner DiGilio's counsel's motion for the fixing of a firm trial date by setting forth that the trial court would get around to that after settling with the United States Circuit conference coming up. The trial court said it would do the best it could, "and we will set it for you as quick as we can." The United States Government failed to set forth any manifest necessity for the granting of the severance after the jury had been impaneled and the only basis upon which the application was made was that the Government had failed to locate what it deemed to be a crucial witness.

In September 1975 a letter was sent to the trial court with a copy to the United States Attorney requesting that the cause be set down for trial in December 1975. The letter set forth that contact had been made with counsel for the various defendants and that each of them would be available in December 1975. The missing crucial witness, Frederick Wankmuller, was also apprehended by the Government in September 1975. Had the absence of Mr. Wankmuller been the reason for not only the severance of the Petitioner DiGilio and for the failure to bring the cause on for trial that defect had now been totally cured.

Due to the failure of either the Government and/or the trial court the matter was not placed on the trial calendar for December 1975. In December 1975 an application was made to the court for a dismissal of the charges based upon the denial to the petitioners of a speedy trial. That motion was heard by the trial court and denied in January 1976 without any opinion.

The matter was not thereafter called for trial until July 1976. During the course of the trial a further application was made on behalf of the petitioners for dismissal of the charges based upon the failure of the Government to provide the petitioners with a speedy trial. That motion was also denied by the trial court.

The record fails to reveal that the trial court ever submitted any opinion in conjunction with its denial of the motions for dismissal based upon the denial of a speedy trial.

REASONS FOR GRANTING THE WRIT

The denial by the trial court of the various motions for a dismissal based upon the failure to provide the petitioners with a speedy trial conflicts with this Court's decision in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972) further, this Court must decide whether or not the severance of the petitioner DiGilio after a jury was impaneled but not sworn at the request of the United States Government based upon its inability to locate its witnesses constituted a violation of the Sixth Amendment in that the petitioner was subjected to double jeopardy and was deprived of his right to a trial by a jury that he had selected pursuant to *Downum v. United States*, 372 U.S. 734 (1963) and *United States v. Jorn*, 400 U.S. 470 (1970).

I.

Petitioners were deprived of their Sixth Amendment right to a speedy trial.

Unless waived, once a demand for a speedy trial is made, as was done in September 1974, it is deemed to be a continuing demand for such speedy trial, and any delay is then to be chargeable to the Government unless some reasons are set forth which would justify the delay.

The Government participated in September 1974 with the petitioner DiGilio in the selection of the jury without raising any objection whatsoever to DiGilio's participation. It must be concluded that the failure to object was a tacit admission of the fact that the Government was prepared to go to trial at least at the time of the selection of the jury. Between the selection of the

jury and its swearing in but after the jury had been selected and DiGilio had no further ability to exercise any challenges, and the jury constituted a panel of Mr. DiGilio's choice for the trial of this matter, the Government then discovered that a witness upon whom it was relying could not be located. There is nothing set forth before the trial court that the Government made any attempt whatsoever to locate its witnesses in order to determine whether or not the Government was ready for trial. The Government proceeded to trial to the extent of having the jury selected before it voiced any distress signal with respect to its failure to be able to present its case. In September 1974 some fourteen months had transpired from the time of the indictment. Certainly, this was a sufficient amount of time for the Government to have determined whether or not it was prepared to go to trial. It can hardly be said that the Government could justify the reasons for its delay because of a crowded trial calendar, or the failure of the petitioner DiGilio to assert his right to a trial inasmuch as DiGilio was not only present, but had participated in the selection of the jury. There can be no question that the Government was aware of the request of September 1974, by DiGilio when he was deprived of the trial by the jury which he helped select, that DiGilio has asked for a firm trial date. The Government equally had to be aware, no matter how many times they changed their attorney, that Mr. Cranswell had agreed that he could proceed to trial against DiGilio sometime in a two to three week period after September 23, 1974. Lastly, the Government had to be aware of the fact that the trial court set forth that it would do whatever it could relative to the setting of such a trial date. Having made this position felt, there is nothing further that the petitioner could do in order to bring about a trial date. At the time of the severance, the petitioner had dug his heels into the ground in protest against being severed and not going to trial. When confronted with the fact that the trial court was going to grant the motion for a severance, the petitioner requested a firm trial date. This was thwarted by the determination of the trial court to solely grant the motion for a severance, and to hold in abeyance the

request for a firm trial date. Thereafter, the petitioner in further pursuit of his request for an immediate trial date made a further motion for dismissal based on failure to provide such a trial date. The Government requested a delay solely as a consequence of their inability to locate the witness, who is someone whom they should have had constant contact with and certainly, some contact prior to entering into the process of the selection of the jury.

Be that as it may, the petitioners made a further demand for a speedy trial by mail in September 1975 and by a motion for a speedy trial on January 20, 1976; that motion was denied and the trial did not take place until July 1976. This constituted a total of thirty-six (36) months between the return date of the indictment and the trial herein, and encompassed three (3) applications by the petitioners for a speedy trial, all of which were denied. The Sixth Amendment to the United States Constitution, in relevant part, provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public *trial*, by an impartial jury of the State and district wherein the crime shall have been committed." (Emphasis provided.)

In 1967, this Court, in *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988 (1967), held that the right to a speedy trial secured by the Sixth Amendment of the United States Constitution was fundamental. What was lacking, however, was any definitive announcement of the standards by which this right to a speedy trial was to be judged. See concurring opinion of Brennan, J. in *Dickey v. Florida*, 398 U.S. 30, 90 S. Ct. 1564 (1970). In 1972, this Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972) undertook to set out the dimensions of this right. First, rejecting the suggestion that a fixed time period be set, it held that the right to a speedy trial is relative and depends upon circumstances. It also rejected the concept that the right to

a speedy trial was waived if not demanded. However, it held that a defendant had some responsibility to assert a speedy trial claim, and emphasized that failure to assert the right would make it difficult for a defendant to prove that he was denied a speedy trial. In *Barker*, this Court established guidelines for determining whether there had been an infringement of this right. Pursuant to these guidelines, the court adopted a "balancing test" which identified four factors the court considered relevant to an assessment of the competing interest:

a) the length of the delay;

b) the reasons for the delay;

c) defendant's assertion of his right; and

d) the prejudice suffered by the defendant.

Id., 407 U.S. at 530, 92 S. Ct. at 2191. See generally *Moore v. Arizona*, 414 U.S. 25, 94 S. Ct. 188; *Strunk v. United States*, 412 U.S. 434, 93 S. Ct. 2260 (1973); note, *The Constitutional Guarantee of a Speedy Trial*, 8 Ind. L. Rev. 414 (1974). This Court regarded none of the four factors as either a necessary or sufficient condition to the finding of the deprivation of the right to a speedy trial. Rather, they were to be treated as related factors to be considered with such other circumstances as may be relevant. In the instant matter the delay between indictment and trial was some thirty-six (36) months, the indictment being returned in July 1973, and the petitioners being tried in July 1976. No reason has ever been set forth with respect to the delay. There is some colloquy in September 1974, which is some fourteen months after the return of the indictment, wherein the United States Attorney sets forth difficulty he is having in obtaining a witness. However, some five days later, the Government set forth no objection to the scheduling of the trial within two or three weeks for these petitioners. Thereafter, there is no setting forth of any reason for the failure to list this matter

for trial, even after a letter and a further motion for dismissal. There is no question that the petitioners have asserted their right to a speedy trial. This was done in September 1974, September 1975 and in January 1976. Quite apart from the actual requests for a speedy trial, the petitioners have been present on all occasions when a trial was called, and at least the petitioner DiGilio has been ready to proceed to trial on all occasions. The fourth factor of prejudice should not even be considered in those instances where demands for a speedy trial have been affirmatively made, and should only be considered where there has been a lengthy, unexplained delay with an absence of a demand for a speedy trial. However, although demands for speedy trial were made on a minimum of three occasions herein, the petitioners have been prejudiced by the delay of thirty-six (36) months from indictment and a delay of almost eight years from the date of the alleged criminal acts. It is well settled that even where petitioner is not subjected to lengthy pretrial incarceration, he may nonetheless be severely prejudiced by an unreasonable delay in his prosecution. For example, prejudice may be manifested in terms of faded memories, lost evidence or increased anxiety which the criminal defendant experiences as he awaits disposition of his case. *United States v. Mann*, 291 F. Supp. 268, 271 (S.D.N.Y. 1968); in addition, the defendant automatically endures "restraints on his liberty" and lives "under a cloud of anxiety, suspicion, and often hostility", *Barker v. Wingo, supra*, 407 U.S. at 533, 92 S. Ct. at 2193. See also *United States v. Ewell*, 383 U.S. 116, 120, 86 S. Ct. 773, 776 (1966); *Smith v. Hooey*, 393 U.S. 374, 380, 89 S. Ct. 575 (1969); *Klopfer v. North Carolina, supra*, 386 U.S. at 221 and 222, 87 S. Ct. at 992 and 993 (1967). Finally, as this Court recently explained in *Dillingham v. United States*, 423 U.S. 64, 96 S. Ct. 303 (1975):

> "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy,

> and create anxiety in him, his family, and his friends." 423 U.S. at 65, 96 S. Ct. at 303.

While this form of prejudice may be *de minimis* is some cases, clearly in this case, such prejudice is quite significant. Here, the petitioners are individuals with families which consist, in the case of DiGilio, of seven children, and in the case of Sangillo in a marriage of thirty years. At the time of their arrests, neither had a prior record of criminal activity and were regarded as exemplary citizens who were well respected in their communities. Each of them worked steadily, and went from job to job where advancement was a prospect. Under these circumstances, their vulnerability to the prejudice mentioned above is apparent. Finally, as this Court recognized in *Barker*:

> "There is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused."

The instant case presents an exemplary situation for affirmative enforcement of the aforementioned societal interest, *Barker v. Wingo, supra,* 407 U.S. at 531, 92 S. Ct. at 2192. This is a case that was ready for trial in July of 1974. At about that time, the Government resisted the motion for the petitioner DiGilio for a severance, and either expressly or impliedly affirmed that the Government was ready for trial. The trial date set for July 1974 was continued at the request of the Government and the matter came before the court in September of 1974. When the matter was called for trial, the Government again asked for a continuance based upon its setting forth that there was a witness whom the Government had not been able to reach for some six (6) weeks. A further continuance was granted until September 24, 1974, at which time the Government set forth that it required a severance of Petitioner DiGilio. The Government set forth no time period within which it would be ready, but did not object and expressly joined in an application that the matter be set down for trial for a date certain within two to three weeks.

There is no indication that any additional investigation was either undertaken or required for presentation of the Government's case. From September 1974, no discernible reason has ever been set forth as to why the Government failed to proceed expeditiously. All adjournments from July 1974 were secured by the Government, and at every scheduled trial date, all defense counsel appeared, ready to proceed with the trial. On each occasion, when the petitioners appeared for the series of scheduled trial dates, ready and eager for a trial of the charges leveled against them, they were met by one excuse or another by the Government as to why the case could not conveniently be tried. As a result, they have lived under a humiliating penumbra of suspicion and distress generated by the, at that time, unresolved charges which questioned their professional and personal integrity, and their general worth as individuals. In short, the interests sought to be protected by the right to a speedy trial, both theirs and of society, have been undermined.

It is not necessary that all of the grounds set forth in *Barker* be present. With respect to DiGilio, we do have a valid assertion of his right to a speedy trial, and his expectation that such would be granted. Sangillo was aware of these proceedings, and could well have determined that there was no point in his repeating that which was being so effectively done by DiGilio. The granting of a trial to DiGilio would have equally resulted in the granting of a trial to Sangillo. It can hardly be asserted that the Government deprived DiGilio of his constitutional rights and did not deprive Sangillo of his where the Government failed to follow through on the granting of a trial. As of September 23, 1974, both petitioners had been severed from the trial that commenced at that time and were both awaiting trial thereafter. The entire history of the subsequent proceedings show that all that was done was done jointly for and on behalf and to Sangillo and DiGilio. In *United States v. Marion,* 404 U.S. 307 and *Dillingham v. United States*, 423 U.S. 64, this Court held that the right to a speedy trial guaranteed by the Sixth Amendment is activated by the formal accusation of a crime, either by

indictment, information or arrest. As was set forth in *Marion, supra:*

> "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends. . . . So viewed, it is readily understandable that it is either a formal Indictment or information, or else the actual restraints imposed by arrest and holding to answer a criminal charge that engaged the particular protections of the speedy trial provisions of the Sixth Amendment."

In *Barker v. Wingo, supra,* at page 532, the Court said:

> "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense can be impaired."

This Court specifically held in *Klopfer v. North Carolina,* that oppressive pretrial confinement is not required for relief under the speedy trial portion of the Constitution. There can be no question that the ability of the defense was impaired by the delay from 1968 to 1976, when the Court reviews the direct testimony and cross-examination of Frank DiGilio. There can be no question that Mr. DiGilio testified accurately to the fact of his employment. Mr. DiGilio's ability to accurately remember dates and the times of such work was impaired however by the hiatus of eight years. The best that could be hoped for after so much

time is testimony from memories "refreshed" by reference to records wherever they might exist.

In support of this request for the issuance of a writ, the attention of the Court is respectfully directed to *Strunk v. United States, supra,* where this Court ruled that when there has been a denial of a speedy trial, the judgment must be set aside, the sentence vacated, and the indictment dismissed.

II.

The conviction herein violated Petitioner Frank DiGilio's rights pursuant to the Fifth Amendment of the United States Constitution barring double jeopardy.

The attention of the Court is respectfully directed to the Appendix, *infra* at page 9a, which is a transcript of a proceeding of September 23, 1974, before the Honorable Clarkson S. Fisher. The transcript evidences the fact that a jury had been picked on the previous Thursday, but not sworn. The transcript evidences the fact that the petitioner DiGilio is ready and prepared to proceed to trial immediately. Despite the fact that a jury had been impaneled and the petitioner DiGilio, was ready to proceed to trial, the United States Government asked for a severance of DiGilio. Without the court making any inquiry of counsel for the Government as to whether or not there was any truth to the allegations made by the Government in the previous *in camera* hearing, and without making any inquiry as to whether or not the Government was now in possession of any further and additional information; and without inquiring as to why the Government felt that it needed an immediate severance and removal of DiGilio from the present trial, but would be ready to try Mr. DiGilio in a separate trial within two to three weeks, the court granted the motion for severance.

For the Government to have determined that it did not have the ability to proceed to trial after having participated in the selection of the jury with DiGilio is tantamount to the Government tampering with the jury selection proceeding and depriving this petitioner of his right to a trial with the first jury selected by him and the Government. DiGilio had a valued right to the particular jury that had just been selected, a right of constitutional dimensions. That right was thwarted by the Government requesting a severance subsequent to the selection of that jury. *United States v. Jorn*, 400 U.S. 470 (1970). In *Downum v. United States*, 372 U.S. 734 (1963), a jury had been sworn and trial was about to begin for Raymond Downum, a man charged with stealing from the mail and forging and uttering checks so stolen. The Government was told to proceed with its case, but instead of calling its first witness the prosecutor asked that the jury be discharged because its key witness of two of the seven counts charged had not been served with a subpoena. The jury was discharged, and a new trial was had, and a conviction resulted over a plea of double jeopardy. On appeal, the Fifth Circuit confirmed. *Downum v. United States*, 300 F.2d 137 (5th Cir. 1962). On writ of certiorari, this Court reversed. The Court recognized the situation as one where the prosecutor entered upon the trial of the case without sufficient evidence to convict. As later set forth by the Ninth Circuit in *Oelke v. United States*, 389 F.2d 668, 672 (9th Cir. 1967), the reason why double jeopardy was attached to *Downum* was the possibility of the unjustified harassment of citizens due to the whims of the prosecuting officer. The same situation prevails herein, even though the jury had not been sworn. *Downum*, is most relevant based upon the fact that the granting of the severance constituted a violation of basic, fundamental constitutional rights in that DiGilio was deprived of his ability to go to trial with the jury that he had selected as a consequence of the failure of the Government to be ready for trial. *United States v. Jorn, supra.*

In the event that events occur which impede the ability of the Government to fairly present its case against a defendant, then and in that event, the Government has the right to submit such material to the trial court as to evidence "manifest necessity" for the granting of a severance and/or mistrial. In the within matter, the severance of DiGilio is the equivalent of the granting of a mistrial in that DiGilio was deprived of the ability to proceed to trial before the jury he had selected. At no time did the Government set forth material that constituted the necessary elements of manifest necessity. In the proceeding *in camera* without the presence of the attorneys for the defendants, the Government set forth that it had not been able to locate a witness. That does not constitute manifest necessity. The Government thereafter submitted an affidavit with some allusion to a threat made upon the life of Frederick Wankmuller. However, in the proceedings on September 23, 1974, which led to the grant of the severance, no statement was made with respect to a threat. At no time was the attorney for DiGilio advised with respect to the alleged threat against the life of Frederick Wankmuller. Had such been done, then DiGilio would have been able to raise some question relative to the validity of a statement allegedly made in 1973, and with respect to the circuitous route of hearsay relative to the alleged threat. The statements that were made were sealed so that the attorney for the petitioner was never advised of their content at a time when he could have raised valid objection, or have made his record. If the Court will note, at the proceedings on September 23, 1974, counsel for DiGilio set forth that he had not been shown any reason, and that he awaited the presentation of such reason. The trial court, without any further inquiry; without making any attempt to determine if what the Government had presented had any basis in fact; and without requiring the detailing to show credibility, proceeded to grant a severance. The granting of a severance was made in light of the fact that the trial court recognized that by so doing, it was creating a double jeopardy problem. DiGilio is aware of the precedents that set forth that jeopardy is not attached until the jury has been both

impaneled and sworn. It is submitted to the Court that that distinction should not bar the determination of double jeopardy in the within matter inasmuch as the jury had been impaneled through the participation of the defendant in its selection. No reason is set forth in the transcripts as to why the jury was not sworn from September 19, 1974, when it was impaneled, to September 23, 1974, when it was sworn. The trial court illustrated its concern with respect to a double jeopardy question even though the trial court was aware that the jury had not been sworn. The Government, advised of the fact that there were double jeopardy questions, as a consequence of the impaneling of the jury, persisted in its demand for a severance. The Government did not provide any basis upon which a court could conclude manifest necessity was present in the within matter. The Government, by its constant requests for the granting of a severance solely because of the Government's failure to produce a witness, was exercising a power to interfere and tamper with the judicial process and to prevent the defendant from being tried by the jury of his selection. This is the same philosophy that has determined that jeopardy has attached once the jury has been impaneled and sworn. No distinction can be drawn in the within matter, in light of the totality of circumstances, between the situation where the jury is impaneled with the participation of DiGilio and a situation where that same jury is impaneled with the participation of DiGilio and is sworn. It makes no sense to feel that a basic fundamental constitutional right would be deprived by the added factor of solely swearing a jury and not deny DiGilio the same right because the jury had not been sworn prior to the time of the motion for a severance. The addition of the swearing of a jury after it has been impaneled should have no spontaneous effect on the defendant which can be said to automatically charge him with an appreciable degree of insecurity once he has made preparations for trial and selected those of his peers who will determine his fate. It is apparent from the record that no consideration was given to the possibility of a trial continuance. The Government set forth that it could be ready within two to three weeks of September 23,

1974, and it may well be that the jury could have been held over for that length of time. Equally so, the Government might have been put to the burden of being ready in a shorter time so that the jury selected by DiGilio could have been retained for the purposes of his trial. The trial judge might have acted abruptly in granting the severance which was tantamount to discharging the jury in the case of DiGilio had the prosecutor been disposed to suggest a continuance. When one examines the circumstances surrounding the granting of the severance, it seems abundantly apparent that the trial judge was given no ability to exercise a sound discretion to assure, that taking all the circumstances into account, that there was manifest necessity for the granting of the severance of DiGilio. In *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931), the United States Attorney failed to have his witnesses present for the trial. The court dismissed the jury, and a new jury was later impaneled for trial. The defendant thereupon pleaded that he was placed in double jeopardy. The Ninth Circuit recognized that jeopardy attached when the jury is impaneled with certain exceptions. It denied the Government's claim that this particular case fell within those exceptions. The court, relying on the fact that the District Attorney had suggested the impaneling of the jury knowing that his witnesses were not present, said:

> "We are dealing, however, with a fundamental right of the person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice. . . . No court has gone to the extent of holding that, after the impanelment of the jury for the trial of a criminal case, operates as a protection against a retrial of the same cause." (*Cornero* at 71.)

The grant of the motion for a severance put DiGilio in the position of being retried even though no evidence had been

presented. The motion for a severance put DiGilio in the position of being retried even though no evidence had been adduced up to that time. The denial of the motion for a severance would have prevented the prosecutor from subjecting DiGilio to a second prosecution by discontinuing the trial when it appeared to the prosecutor that he either had insufficient evidence or that this jury would not convict. *Greene v. United States*, 355 U.S. 184 (1957). To allow the Government to dismiss the entire prosecution, which was the effect of the severance herein, is to thwart the very policies that the Supreme Court has chosen to protect by having jeopardy attached after the impaneling of a jury. It is plain that the prosecutor committed a particularly unpardonable fault in that he was unprepared on September 23, 1974. Nothing that the petitioner did in any way contributed to the inability of the prosecutor to proceed with the trial after the impaneling of the jury. To deny DiGilio the benefits of the double jeopardy clause of the Sixth Amendment would then constitute a condoning of the negligence of the prosecutor, and totally disregard any rights that DiGilio would have relative to a speedy trial; the right to be tried by the jury that he had selected; and to avoid the further impositions of insecurity and anxiety by closing the doors of the courtroom to the petitioner after he had fully prepared for trial.

If jeopardy were not to attach at the impaneling of the jury there would exist a period of time, prior to the swearing of the jury, during which a defendant's double jeopardy interests would be arbitrarily foreclosed from consideration. "The defendants valued right" to proceed would become subject to prosecutorial manipulation. The prosecutor would have a period of time after the impaneling of the jury (but before its being sworn), during which he could dismiss the jury in order to:

1. deprive the defendant of a favorably disposed tribunal, or

2. correct a tactical set-back to the prosecutor, or

3. take advantage of knowledge gained from defenses requested voir dire questions, and/or defense motions.

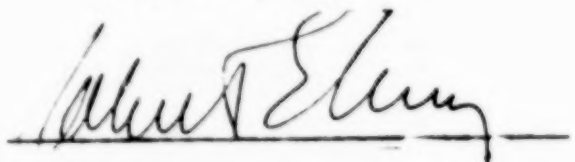
Unless jeopardy attaches upon the impaneling of the jury, the defendant's valued right to proceed before a particular tribunal is afforded no protection; the defendant is subjected to harassment as a consequence of continued prosecutions by the Government and the Fifth Amendment double jeopardy clause would thereby lose its substance. Although the swearing of the jury normally follows shortly after its impanelment there still remains a very crucial interim period. This period of time may take only a few minutes or it may span a weekend recess, thus taking days, as is the situation herein. Regardless of the length of time involved, the fact remains that this is a period of time during which the prosecution may contemplate the desirability of the chosen jury panel. If the prosecutor does not like what he sees or if he decides that the jury is defense oriented, he can dismiss the entire prosecution without any showing of manifest necessity or sound judicial administration, thus denying defendant his valued right to have his trial completed by a particular tribunal. In the matter herein the prosecution set forth its inability to locate what it deemed to be a crucial witness. As a consequence thereof the Government determined to abort the trial with respect to DiGilio. There is no basis to conclude that the Government was not aware that it did not have its important witness before it even impaneled the jury. One must conclude that the Government was dissatisfied with the jury that was impaneled as far as DiGilio was concerned and thereupon determined to move for a severance on a make-weight reason. Allowing the prosecutor to sever a defendant is the equivalent of a dismissal of a jury without any showing of extraordinary circumstances or manifest necessity and constitutes a total denial of the protection of the double jeopardy clause. In essence, the procedure followed herein, gave the prosecution an infinite number of peremptory challenges by allowing the prosecutor to dismiss arbitrarily, an entire prosecution as far as DiGilio was concerned; discharge all of the jurors as far as DiGilio was

concerned; place the matter on a trial calendar some twenty-two (22) months later; and pick a new jury of twelve (12) men and women. DiGilio had no corresponding privilege of aborting the proceedings at his whim and picking a new jury more to his liking. DiGilio was denied the privilege afforded the prosecutor of examining the jury as a whole and the option of challenging all twelve (12) jurors and starting anew.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,



s/ Robert E. Levy
LEVY, ROBERTSON
& HERSON
Attorneys for Petitioners

May, 1978

APPENDIX I — INDICTMENT

(Filed July 23, 1973)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

vs.

NICHOLAS VALVANO, aka "Nicky Boy"; VINCENT J. CRAPORATTA, aka "Jimmy Sinatra"; FRANK DI GILIO, aka "Frankie D"; EUGENE SANGILLO, aka "Gino"; JOSEPH CELSO, and LILLIAN GREAVES,

Defendants.

Criminal No. 472-73

18 USC, § 2
18 USC, § 371
18 USC, § 495
18 USC, § 1342

The Grand Jury, in and for the District of New Jersey, sitting at Newark, charges:

COUNT 1

From on or about the 26th day of September, 1968, and continuously thereafter, up to and including the date of the filing of this Indictment, in the District of New Jersey,

NICHOLAS VALVANO, aka
"Nicky Boy";

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VINCENT J. CRAPORATTA, aka
"Jimmy Sinatra";
FRANK DI GILIO, aka
"Frankie D";
EUGENE SANGILLO, aka
"Gino";
JOSEPH CELSO, and
LILLIAN GREAVES,

the defendants herein, willfully, and knowingly did combine, conspire, confederate, and agree together, with each other, and with Herbert Gross, Frank Newman, and Fred Wankmuller, named as co-conspirators but not as defendants herein, and with diverse other persons to the Grand Jury unknown, to commit the following offenses against the United States:

1. to willfully and knowingly, and with intent to defraud the United States, falsely make, forge and counterfeit and cause to be falsely made, forged, and counterfeited, certain writings, that is, the signature and endorsement of the registered owner of twenty-four (24) United States Savings Bonds, Series E, to wit, the words "Margaret E. Sharp" on the back thereof, for the purpose of obtaining and receiving from the United States and from its officers and agents, a sum of money, the said United States Savings Bonds being genuine obligations of the United States.

In violation of Title 18, United States Code, Section 495; and

2. to willfully and knowingly and with intent to defraud the United States, utter and publish as true, and cause to be uttered and published as true, certain writings, to wit, twenty-four (24) United States Savings Bonds, Series E, containing thereon false, forged, and counterfeit signatures and endorsements, the said

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NICHOLAS VALVANO, aka
"Nicky Boy";
VINCENT J. CRAPORATTA, aka
"Jimmy Sinatra";
FRANK DI GILIO, aka
"Frankie D";
EUGENE SANGILLO, aka
"Gino";
JOSEPH CELSO, and
LILLIAN GREAVES,

the defendants herein, knowing the said signatures and endorsements to have been false, forged, and counterfeited.

In violation of Title 18, United States Code, Section 495; and

3. to use and assume a false, fictitious and assumed name to conduct, promote, and carry on by use of the Postal Service an unlawful business, to wit, the forging and uttering of United States Savings Bonds, Series E, in violation of Title 18, United States Code, Section 495.

In violation of Title 18, United States Code, Section 1342.

It was a part of said conspiracy that FRANK DI GILIO would receive stolen United States Series E Savings Bonds registered to Margaret E. Sharp and Anna M. Sharp.

It was further part of said conspiracy that FRANK DI GILIO, EUGENE SANGILLO, and Fred Wankmuller would discuss the forging and uttering of said stolen United States Series E Savings Bonds with Herbert Gross and NICHOLAS VALVANO.

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It was further part of said conspiracy that LILLIAN GREAVES would forge the signature of Margaret E. Sharp on said stolen United States Series E Savings Bonds at the Trust Company of Ocean County in Lakewood, New Jersey.

It was further part of said conspiracy that NICHOLAS VALVANO, VINCENT J. CRAPORATTA, and Herbert Gross would derive proceeds from the forging and uttering of said stolen United States Series E Savings Bonds.

It was further part of said conspiracy that FRANK DI GILIO, JOSEPH CELSO, and EUGENE SANGILLO and Fred Wankmuller would seek to recover proceeds from the forging and uttering of the said stolen United States Series E Savings Bonds.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants and co-conspirators performed the following overt acts:

1. On or about October 16, 1968, LILLIAN GREAVES checked into the Claridge Hotel in Lakewood, New Jersey.

2. Between October 1, 1968, and October 16, 1968, FRANK DI GILIO met with EUGENE SANGILLO and Fred Wankmuller in Lakewood, New Jersey.

3. Between October 1, 1968, and October 16, 1968, VINCENT J. CRAPORATTA met with Herbert Gross in Ocean County, New Jersey.

4. Between October 16, 1968, and October 20, 1968, NICHOLAS VALVANO met with Herbert Gross at Lakewood, New Jersey.

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5. Between October 16, 1968, and December 31, 1968, JOSEPH CELSO, EUGENE SANGILLO, and FRANK DI GILIO met with Fred Wankmuller in Lakewood, New Jersey.

In violation of Title 18, United States Code, Section 371.

COUNT II

On or about October 16, 1968, in the District of New Jersey,

NICHOLAS VALVANO, aka
"Nicky Boy";
VINCENT J. CRAPORATTA, aka
"Jimmy Sinatra";
FRANK DI GILIO, aka
"Frankie D";
EUGENE SANGILLO, aka
"Gino", and
LILLIAN GREAVES,

the defendants herein, with intent to defraud the United States, did falsely make, forge, and counterfeit, and cause to be falsely made, forged, and counterfeited certain writings, that is, the signature and endorsement of the registered owner of twenty-four (24) United States Savings Bonds, Series E, to wit, the words "Margaret E. Sharp" on the back thereof, for the purpose of obtaining and receiving from the United States, and from its officers and agents a sum of money, the said United States Savings Bonds being genuine obligations of the United States.

In violation of Title 18, United States Code, Sections 495 and 2.

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COUNT III

On or about October 16, 1968, in the District of New Jersey,

NICHOLAS VALVANO, aka
"Nicky Boy";
VINCENT J. CRAPORATTA, aka
"Jimmy Sinatra";
FRANK DI GILIO, aka
"Frankie D";
EUGENE SANGILLO, aka
"Gino", and
LILLIAN GREAVES,

the defendants herein, with intent to defraud the United States, did utter and publish as true, and cause to be uttered and published as true certain writings, to wit, twenty-four (24) United States Savings Bonds, Series E, containing thereon false, forged, and counterfeit signatures and endorsements. The said

NICHOLAS VALVANO, aka
"Nicky Boy";
VINCENT J. CRAPORATTA, aka
"Jimmy Sinatra";
FRANK DI GILIO, aka
"Frankie D";
EUGENE SANGILLO, aka
"Gino", and
LILLIAN GREAVES,

the defendants herein, knowing the said signatures and endorsements to have been false, forged, and counterfeited.

Appendix I

In violation of Title 18, United States Code, Sections 495 and 2.

COUNT IV

From on or about October 16,/ 31st 1968, and continuously thereafter, up to and including the date of the filing of this Indictment, in the District of New Jersey,

NICHOLAS VALVANO, aka
"Nicky Boy";
VINCENT J. CRAPORATTA, aka
"Jimmy Sinatra";
FRANK DI GILIO, aka
"Frankie D";
EUGENE SANGILLO, aka
"Gino", and
LILLIAN GREAVES,

the defendants herein, for the purpose of conducting, promoting, and carrying on by means of the United States Postal Service, an unlawful business, to wit, forging and uttering of United States Savings Bonds, Series E, in violation of Title 18, United States Code, Section 495, did use and assume, and caused to be used and assumed, a fictitious, false, and assumed name and address, to wit, Margaret E. Sharp, Claridge Hotel, Lakewood, New Jersey.

In violation of Title 18, United States Code, Sections 1342 and 2.

A TRUE BILL:

_____

FOREMAN

Appendix I

HERBERT J. STERN
United States Attorney
District of New Jersey

LIAM S. COONAN
Acting Attorney in Charge
Newark Strike Force

APPENDIX II — PORTION OF TRANSCRIPT OF SEPTEMBER 23, 1974

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

v.

NICHOLAS VALVANO; VINCENT J. CRAPORATTA; FRANK DI GILIO; EUGENE SANGILLO; JOSEPH CELSO, and LILLIAN GREAVES,

Defendants.

Criminal No. 472-73
74-136

VOLUME I

Trenton, New Jersey
September 23, 1974

BEFORE:
HONORABLE CLARKSON S. FISHER, U.S.D.J.
and a Jury

APPEARANCES:

UNITED STATES DEPARTMENT OF JUSTICE,
For the Government,
BY: JOSEPH L. CRANWELL, JR., ESQ.
Special Attorney.

Appendix II

CHARLES FRANKEL and ADOLPH V. CARBONE, ESQS.,
For the Defendant Vincent J. Craporatta.

NOONAN & FLYNN, ESQS.,
BY: JOHN W. NOONAN, ESQ.,
For the Defendant Frank Di Gilio.

MICHAEL A. QUERQUES, ESQ.,
For the Defendant Joseph Celso.

MORNING SESSION

(Hearing commenced at 10:25 a.m. — jury not present.)

MR. CRANWELL: Good morning, your Honor.

THE COURT: Good morning.

MR. CRANSWELL: At this point, Judge, I would ask the Court to sever Mr. Frank DiGilio from the trial of this case.

THE COURT: Any remarks?

MR. NOONAN: Your Honor, in this matter, this is now the fourth time that I, as third or fourth new counsel in this case, have been here in Trenton. I came down two weeks ago not having looked at the file, got myself ready for the following Thursday to pick a jury. We did in fact pick a jury, carried over to last Thursday when I appeared again ready.

We're ready to proceed today. This case is now fairly old.

Prior to its being moved at this point, it was my understanding that it was going to be moved subsequent to

Appendix II

another case in which Mr. Cranwell was involved, in which my client is not involved.

The only purpose of these remakrs, your Honor, is, I suppose, if the United States Government has cogent reasons for moving to sever Mr. DiGilio, I as Mr. DiGilio's counsel, have no valid reasons to object to it. But, thus far, I haven't heard any reasons as to why he should be severed and why his constitutional right to a speedy trial at this point should be impinged upon.

So that, therefore, until I hear some reasons, and if there are any reasons that perhaps should be done in camera, I would like to hear them. But my client is seated here in the courtroom. I have an obligation to advise him as to just where we stand.

And going one step further, Judge, should your Honor grant this motion, I would like a firm trial date set at this point, at which time Mr. DiGilio's case will be moved or dismissed.

MR. CRANSWELL: Your Honor, our application for a severance in this case is based upon the same reasons that were put on the record before you last week in camera. We would be very happy if the Court set a fixed trial date sometime perhaps two or three weeks from now.

THE COURT: All right. I'll grant the motion for a severance. As far as a fixed trial date is concerned, I will get right on that as soon as I get settled with the United States Circuit Conference coming up. As a matter of fact the last two weeks I haven't even been able to get a firm date for lunch. But I'll do the best I can, Mr. Noonan. We will set it for you as quick as we can.

Appendix II

MR. NOONAN: All right, Judge. Thank you very much.

* * *

CERTIFICATE

WE, LYNNE T. ATTARDI and THOMAS F. BRAZAITIS, Official Court Reporters for the United States District Court for the District of New Jersey, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and WE DO FURTHER CERTIFY that the foregoing transcript has been prepared by me or under my direction.

LYNNE T. ATTARDI

THOMAS F. BRAZAITIS

INSERT
77-1616

APPENDIX III — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1389
77-1618

UNITED STATES OF AMERICA

vs.

NICHOLAS VALVANO; VINCENT J. CRAPORATTA; FRANK DI GILIO; EUGENE SANGILLO; JOSEPH CELSO, and LILLIAN GREAVES

Eugene Sangillo,

Appellant in No. 77-1389

UNITED STATES OF AMERICA

vs.

NICHOLAS VALVANO; VINCENT J. CRAPORATTA; FRANK DI GILIO; EUGENE SANGILLO; JOSEPH CELSO, and LILLIAN GREAVES

Frank DiGilio,

Appellant in No. 77-1618

Appeal from the United States District Court for the District of New Jersey
(D.C. Crim. No. 472-73)

Argued
April 25, 1978
Before: ALDISERT and ADAMS, *Circuit Judges*, and HANNUM, *District Judge.**

After considering the contentions raised by appellants, to-wit, that (1) appellants should be granted a judgment of acquittal based upon the deprivation of their Sixth Amendment rights in that they were not afforded a speedy trial; (2) the government failed to prove the conspiracy alleged in the indictment; (3) the conviction sub judice violates appellant DiGilio's rights pursuant to the Fifth Amendment barring double jeopardy; and (4) appellants were not aiders and abettors; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT

s/ Aldisert
DATED: April 25, 1978 Circuit Judge

Attest:

s/ N. Elizabeth Ferguson
Chief Deputy Clerk

Certified as a true copy and issued in
lieu of a formal mandate on May 26, 1978.

Test: THOMAS F. QUINN

Clerk, United States Court of
Appeals for the Third Circuit

* Honorable John B. Hannum, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

No. 77-1816

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRANK DI GILIO and EUGENE SANGILLO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

WILLIAM G. OTIS,
JOHN VOORHEES,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1816

FRANK DI GILIO and EUGENE SANGILLO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (App. A, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1978. The petition for a writ of certiorari was filed on May 30, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were deprived of a speedy trial.

2. Whether petitioner Di Gilio's trial was barred by the Double Jeopardy Clause.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiring to forge endorsements on United States Savings Bonds, in violation of 18 U.S.C. 371, and of forging and uttering forged United States Savings Bonds, in violation of 18 U.S.C. 495 and 2. Petitioners were sentenced to concurrent terms of two years' imprisonment. The court of appeals affirmed (App. A, *infra*).

In 1968, twenty-five $1000 United States Savings Bonds were stolen from Margret Sharp in Chester, New Jersey. Thereafter, one Fred Wankmuller asked petitioner Di Gilio for help in marketing the bonds. Di Gilio then spoke with petitioner Sangillo about the scheme. After further discussion with Wankmuller, petitioners agreed to sell the bonds (C.A. App. 32b), and Wankmuller gave the bonds to Di Gilio (C.A. App. 36b).[1]

[1] "C.A. App. a" refers to the appendix filed by petitioners in the court of appeals. "C.A. App. b" refers to the supplemental appendix filed by the government in the court of appeals.

About a week later, petitioners and Wankmuller met with Herbert Gross and co-defendant Nicholas Valvano. Gross and Valvano said they might be able to sell the bonds (C.A. App. 39b-44b, 81b), but they were unsure how much money they could get for them (C.A. App. 46b). Petitioners nevertheless agreed to transfer the bonds with the understanding that they would be paid later. Valvano, Gross, and co-defendants Craporatta and Greaves later cashed the bonds at their full face value, but petitioners were unsuccessful in their attempts to obtain any of the cash proceeds from the stolen bonds (C.A. App. 59b-61b, 63b, 113b-114b, 115b).[2]

ARGUMENT

1. Petitioners contend (Pet. 7-15) that the three-year delay between their indictment in July 1973 and their jury trial in July 1976 deprived them of their Sixth Amendment right to a speedy trial.

As this Court held in *Barker* v. *Wingo*, 407 U.S. 514, 530-533, the question whether a delay in bringing a defendant to trial violates the Sixth Amendment depends on the length of the delay, the reasons for it, the extent of prejudice caused by the delay, and whether the defendant has asserted his right to a speedy trial. Judged by these standards, the delay

[2] Valvano pleaded guilty to one count of conspiracy in September 1974. Herbert Gross was named in the indictment as an unindicted co-conspirator.

in this case did not violate petitioners' Sixth Amendment rights.

The 14-month delay between the indictment and the original trial date in September 1974 was attributable for the most part to the pretrial motions filed on behalf of petitioners and their co-defendants, including a motion to remove travel restrictions, a motion for discovery and inspection, a motion by petitioner Di Gilio for a severance, and motions by both petitioners for dismissal of the indictment. During this period, petitioners made no request to expedite their trial (C.A. App. 2a-5a).

On the eve of trial, which had been scheduled for September 1974, the chief government witness, Fred Wankmuller, disappeared (C.A. App. 6b-8b); he was not apprehended until September 1975 (C.A. App. 36a).[3] The absence of the principal witness for the government is a valid reason to justify delay in the commencement of trial. *Barker* v. *Wingo*, *supra*, 407 U.S. at 531; *United States* v. *Lawson*, 545 F.2d 557, 560 (C.A. 7); see also 18 U.S.C. 3161(h)(3)(A). The remaining delay of 10 months before petitioners' trial in July 1976 was caused in part by hearings on additional motions made by the defense,

[3] Following the disappearance of this witness, the government successfully moved to sever petitioner Di Gilio from the trial of co-defendants Celso and Craporatta (C.A. App. 23a-26a). That trial ended in a mistrial on September 27, 1974. The indictment was dismissed against Craporatta on October 15, 1975 (C.A. App. 6a). Celso was tried with petitioners and convicted.

including a second motion by petitioner Di Gilio to dismiss the indictment (C.A. App. 6a-8a).

In addition, petitioners did not press throughout the pre-trial period for an early trial. Petitioner Sangillo did not raise the claim at all before trial, and petitioner Di Gilio raised the claim only when the principal government witness disappeared. At that time, petitioner Di Gilio requested that trial be held on the originally scheduled trial date in September 1974, but he did not raise the speedy trial issue again until December 22, 1975, when he moved for dismissal of the indictment on speedy trial grounds (C.A. App. 28a-29a).[4] Finally, petitioners, who were not in custody during the period of delay, have neither claimed nor demonstrated that the delay in any way prejudiced their defense.[5] Under these circumstances, petitioners have failed to show a constitutional violation under the *Barker* v. *Wingo* standards.

2. Petitioner Di Gilio contends (Pet. 15-21) that his conviction violated the Double Jeopardy Clause because in September 1974, after a jury was selected but before it was sworn, the district court granted the government's motion to sever him from his co-

[4] Petitioners contend that they made a request for a speedy trial "by mail" in September 1975 (Pet. 9). We have not found any reference to this demand in the record.

[5] Petitioners note (Pet. 11) that "prejudice may be manifested in terms of faded memories, lost evidence or increased anxiety," but make no claim that *their* defense was adversely affected by any of those possibilities. Rather, they argue that, in this case, the "factor of prejudice should not even be considered" (*ibid.*).

defendants. Although Di Gilio was not tried at that time, he contends that he was placed in jeopardy then and that the 1976 trial therefore impermissibly placed him in jeopardy for a second time. This contention has no merit.

Petitioner Di Gilio was not subjected to a second jeopardy because he was not in jeopardy at the first trial. In *Crist* v. *Bretz*, No. 76-1200, decided June 14, 1978, this Court reaffirmed the rule that jeopardy attaches when the jury is sworn (slip op. 8), noting that the rule "is not only a settled part of federal constitutional law [but] a rule that both reflects and protects the defendant's interest in retaining a chosen jury" (*id.* at 10). Di Gilio urges that he was exposed to practically the same hardships that he would have experienced had the jury been sworn while he was still joined with the other defendants. But this Court rejected a similar argument in *Serfass* v. *United States*, 420 U.S. 377, where the Court held that the Double Jeopardy Clause "does not come into play until a proceeding begins" before the trier of fact (*id.* at 391), and that the proceeding does not begin in a jury trial until "a jury is empanelled and sworn" (*id.* at 388).[6]

[6] In *Downum* v. *United States*, 372 U.S. 734, upon which Di Gilio relies, the jury was dismissed after jeopardy had attached because the government failed to subpoena a key witness and the witness consequently did not appear. In this case, by contrast, jeopardy had not attached; the witness (Wankmuller) had been subpoenaed (C.A. App. 6b-7b); and his failure to appear was not due to prosecutorial negligence but, apparently, to Wankmuller's fear that he would be murdered if he testified (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

WILLIAM G. OTIS,
JOHN VOORHEES,
Attorneys.

AUGUST 1978.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1389
77-1618

UNITED STATES OF AMERICA

vs.

NICHOLAS VALVANO; VINCENT J. CRAPORATTA; FRANK DI GILIO; EUGENE SANGILLO; JOSEPH CELSO, and LILLIAN GREAVES

EUGENE SANGILLO,

APPELLANT IN NO. 77-1389

UNITED STATES OF AMERICA

vs.

NICHOLAS VALVANO; VINCENT J. CRAPORATTA; FRANK DI GILIO; EUGENE SANGILLO; JOSEPH CELSO, and LILLIAN GREAVES

FRANK DiGILIO,

APPELLANT IN NO. 77-1618

Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 472-73)

Argued April 25, 1978

Before: ALDISERT and ADAMS, *Circuit Judges*, and HANNUM, *District Judge**

---

* Honorable John B. Hannum, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

After considering the contentions raised by appellants, to-wit, that (1) appellants should be granted a judgment of acquittal based upon the deprivation of their Sixth Amendment rights in that they were not afforded a speedy trial; (2) the government failed to prove the conspiracy alleged in the indictment; (3) the conviction sub judice violates appellant DiGilio's rights pursuant to the Fifth Amendment barring double jeopardy; and (4) appellants were not aiders and abettors; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT

/s/ Aldisert
Circuit Judge

DATED: April 25, 1978

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In The

Supreme Court of the United States

October Term, 1978

No. 77-1816

FRANK DI GILIO and EUGENE SANGILLO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING AND/OR RECONSIDERATION FOR ORDER DENYING PETITION FOR CERTIORARI AND BRIEF IN SUPPORT OF MOTION FOR REHEARING

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FRANK DI GILIO and EUGENE SANGILLO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING AND/OR RECONSIDERATION FOR ORDER DENYING PETITION FOR CERTIORARI

Frank Di Gilio, petitioner herein, presents petition for a rehearing and/or reconsideration of this Court's order dated October 2, 1978 denying the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit and, in support thereof, respectfully shows that the petition is based upon intervening circumstances constituting substantial grounds

available to this petitioner although not previously presented to this Court in that the determination of this Court in *Crist v. Bretz*, 98 S. Ct. 2156 (1978) is of such pertinence and importance as to mandate the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing and/or reconsideration be granted, and that, upon further consideration, a writ of certiorari issued to the United States Court of Appeals for the Third Circuit.

Dated: October 16, 1978

Respectfully submitted,

s/ ROBERT E. LEVY
Attorney for Petitioners
1319 Memorial Drive
Post Office Box 901
Asbury Park, New Jersey 07712
(201) 988-5683

I, Robert E. Levy, attorney for the above named petitioner, do hereby certify that the foregoing petition for rehearing and/or reconsideration is presented in good faith and not in delay and that it is restricted to the grounds specified in Rule 58, Subdivision 2, of the Rules of this Court.

Dated: October 16, 1978

s/ ROBERT E. LEVY
Attorney for Petitioners

In The

Supreme Court of the United States

October Term, 1978

No. 77-1816

FRANK DI GILIO and EUGENE SANGILLO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF IN SUPPORT OF MOTION FOR REHEARING

PRIOR ACTION

The Court denied the original petition for a writ of certiorari on October 2, 1978.

QUESTION PRESENTED ON PETITION FOR REHEARING

2. Whether petitioner Di Gilio's trial was barred by the double jeopardy clause.

STATEMENT

Subsequent to the filing of the brief and appendix on behalf of the petitioner, this Court issued its determination in *Crist v. Bretz*, 98 S. Ct. 2156 (1978). It is submitted that the determination in *Crist v Bretz* is such as to constitute an intervening circumstance of substantial and controlling effect which substantial ground is presently available to the petitioner and has not been previously presented.

ARGUMENT

Petitioner herein was one of several defendants, all of whom were charged in one indictment. On September 13, 1974, two of the co-defendants were severed from the balance of the defendants. On September 19, 1974, the remaining four defendants, including this petitioner, participated in the selection of a jury. The selection of the jury was completed on September 19, 1974 and its composition was satisfactory to the petitioner, who had determined that this was the jury that he wanted to have hear this cause.

For reasons not disclosed in the trial record, the jury was not sworn in on September 19, 1974 and the matter was then carried to the following Monday, September 23, 1974.

Prior to the swearing in of the jury, on September 23, 1974, an application was made by the United States Government to sever the petitioner herein. Counsel for the petitioner objected and set forth that he was ready, willing and able to participate in the trial; that he had appeared on each one of the previous trial dates; and had prepared to go to trial at all times. He registered his objection to the application for the severance. The trial court granted the application of the Government and the petitioner was not tried by the jury of his choice.

The petitioner was thereafter brought to trial in July of 1976 subsequent to a motion made by the petitioner in January of 1976 alleging that any further trial would result in double jeopardy.

The petitioner was found guilty and sentenced in 1976 and the present appeal is a result thereof.

Subsequent to the filing of the petitioner's brief and appendix, this Court considered the issues in *Crist v. Bretz*, 98 S. Ct. 2156 (1978) and its results therein mandates the issuance of the writ of certiorari previously petitioned herein.

It is conceded that in *Crist v. Bretz, supra*, the jury was sworn after its empanelment and prior to the dismissal of the indictment. It is submitted, herein, that the difference between the procedure in *Crist v. Bretz* and the procedure herein is one of form and not of substance. In both instances, the defendants particpated fully in the choice of a trial jury. In each instance, the defendants expressed their satisfaction with the jury, as constituted, for the trial of their cause. In the *Crist v. Bretz*

matter, the jury was sworn. In the matter *sub judice*, the jury was not sworn. Thereafter, in the *Crist v. Bretz* matter, without any activity on the part of the defendant, the State moved for a dismissal of the indictment and thereafter reindicted. In the instant matter, the Government moved for a severance of the petitioner without any activity on the part of the petitioner. To the contrary, the record accurately reflects that the petitioner opposed the granting of the severance and was ready to proceed to trial. In both instances the defendant alleged that any further trial would result in double jeopardy. In both instances, the claim of double jeopardy was disallowed and the defendants were brought to trial.

It is respectfully submitted that all of the rationale which is set forth as the basis for the determination of this Court, that double jeopardy did attach in *Crist v. Bretz*, is equally present and applicable to the situation in the instant matter. The contents of the Court's opinion would fail to set forth any significant distinction in a situation where the jury has not been sworn as contrasted to a situation where the jury has been sworn where all other facts are equal.

The attention of this Court is respectfully directed to pages 2160 and 2161 where Mr. Justice Stewart set forth:

> "The basic reason for holding that a defendant is put in jeopardy even though the criminal proceeding against him terminates before the verdict was perhaps best stated in *Green v. United States*, 355 U.S. 184, 187-188, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199:

> 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'

Although it has thus long been established that jeopardy may attach in a criminal trial that ends inconclusively, the precise point at which jeopardy does attach in a trial might have been open to argument before this Court's decision in *Downum v. United States*, 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100. There the Court held that the Double Jeopardy Clause prevented a second prosecution of a defendant whose first trial had ended just after the jury had been sworn and before any testimony had been taken. The Court thus necessarily pinpointed the stage in a jury trial that jeopardy attaches, and the *Downum* case has since been understood as explicit authority for the proposition that jeopardy attaches when the jury is empaneled and sworn. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S. Ct. 1349, 1353, 51 L. Ed. 2d 642; *Serfass v. United States*, 420 U.S. 377, 388, 95 S. Ct. 1055, 1062, 43 L. Ed. 2d 265.

The reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury. That interest was described in *Wade v. Hunter, supra,* as a defendant's 'valued right to have his trial completed by a particular tribunal.' 336 U. S. at 689, 69 S. Ct. at 837. It is an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice. Throughout that history there ran a strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict.

Regardless of its historic origin, however, the defendant's 'valued right to have his trial completed by a particular tribunal' is now within the protection of the constitutional guarantee against double jeopardy, since it is that 'right' that lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn. *United States v. Martin Linen Supply Co., supra; Serfass v. United States,* 420 U.S. 377, 388, 95 S. Ct. 1055, 1062, 43 L. Ed. 2d 265; *Illinois v. Somerville,* 410 U.S. 458, 467, 93 S. Ct. 1066, 1072, 35 L. Ed. 2d 425; *United States v. Jorn,* 400 U.S. 470, 478-480, 484-485, 91 S. Ct. 547, 553-554, 556-557, 27 L. Ed. 2d 543 (plurality opinion)."

The basis upon which the Court's decision is couched is a need for the preservation of the interest of this petitioner in retaining his chosen jury. That interest and constitutional right was completely frustrated by the action of the prosecutor severing the petitioner from the trial.

Since the trial record does not reveal any significant change in the situation from September 19, 1974 to September 23, 1974, the prosecutor should have set forth his desires to sever this petitioner prior to the selection of the trial jury. After its selection it cannot be totally denied that the action of the prosecutor, on September 23, 1974, might have been motivated by his dissatisfaction with the jury that had been chosen for the purposes of the trial of this petitioner. Absent any other method of denying this petitioner his right by trial by that jury, an application was made for a severance. This creates an unconscionable advantage to the United States Government and required that this Court reconsider the establishment of the point of jeopardy as to when a jury is selected and deemed satisfactory by both sides as opposed to the requirement of the formalistic swearing in of such jury.

The attention of the Court is also respectfully directed to the concurring opinion of Mr. Justice Blackmun who acknowledges that the arguments involving repetitive stress and anxiety upon the defendant; and continuing embarrassment for him, may validly be used to support the argument that jeopardy attaches at some point before the jury is sworn. The position of the petitioner herein is that that point should be immediately after the jury is designated as satisfactory by both sides and that the swearing in of the jury adds nothing that was not previously presented just immediately prior to such swearing in.

The dissenting opinion of Chief Justice Burger in no way constitutes an objection to the rationale of the majority opinion. It addresses itself to the binding quality of the majority opinion upon the States so that State and Federal practice will be uniform. It is the Chief Justice's position that there is no reason why State and Federal rules must be the same.

The dissenting opinion of Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Rehnquist joined, is based upon similar grounds to that of the dissenting opinion of the Chief Justice. Mr. Justice Powell sets forth that he would accept as the established supervisory rule with the Federal system that jeopardy would attach upon the swearing of the jury (see page 2167). Mr. Justice Powell went further and set forth that his acceptance of the attachment of jeopardy at the swearing of the jury would not necessarily impose that requirement upon the States (see page 2169).

From a careful study of the dissenting opinions, it is possible to conclude that all of the justices are agreed that jeopardy attaches upon the selection of a jury in the Federal jurisdiction. The position of the petitioner herein is that no great difference is created solely by the swearing in of that jury and that the selection of the jury should be the actual moment in a Federal prosecution where jeopardy attaches.

Since the jury was already sworn in *Crist v. Bretz*, this question was not before the court and was not determined by it. However, it is respectfully submitted that the determination in *Crist v. Bretz* does not fully determine the issue of when

jeopardy does attach. It is necessary that this Court consider as a companion to *Crist v. Bretz*, a situation where the jury is selected by the defendant and the jury is deemed satisfactory to both parties and a severance is, thereafter, granted prior to the swearing in of such jury where the defendant has registered his vehement objection to such severance.

CONCLUSION

The petitioner herein has set forth intervening circumstances not previously presented to the Court, which petitioner deems mandates the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit with respect to when jeopardy actually attached in the instant matter and the petitioner respectfully submits this brief in support of his various arguments.

Respectfully submitted,

s/ ROBERT E. LEVY
Attorney for Petitioners

Dated: October 16, 1978